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APPENDIX

Memorandum of the Court

[Filed July 11, 1963]

Nine Negro students and their parents instituted this action to require the defendants to transfer the students from Negro public schools to white public schools. The plaintiffs filed their suit as a class action on behalf of all persons similarly situated and prayed that the defendants be enjoined from denying any students admission to a white school on the basis of race.

The defendants answered, generally denying that the plaintiffs are entitled to the relief which they seek.

The City of Hopewell operates the following public schools which are attended by white pupils:

	Capacity	*Attendance*
Patrick Copeland Elementary	740	770
DuPont Elementary	870	832
Woodlawn Elementary	720	649
Hopewell High School	1,075	1,279

The City also operates the following schools which are attended by Negro pupils:

	Capacity	*Attendance*
Harry E. James Elementary	330	167
Arlington Elementary	270	195
Carter G. Woodson	300	286
Carter G. Woodson High School	350	257

The plaintiffs, who sought transfer to Hopewell High School, were denied assignment primarily because they

lived outside the "long established attendance area." Assignments to public schools in Hopewell are made according to geographical attendance areas. The Pupil Placement Board usually makes formal assignment upon the recommendation of the City School Board.

The attendance areas for the several schools were established prior to the decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Minor changes have been made from time to time. The areas follow the distribution of Negro and white residences in the city. In some instances the areas are defined by natural boundaries; in others there is no distinction other than the racial composition of the neighborhoods.

The attendance areas for Arlington School, Carter G. Woodson School and Harry E. James School lie generally south of the Norfolk and Western Railway tracks. The Harry E. James School attendance area is bounded on the west by the railway classification yard. The Seaboard Air Line Railroad forms the boundary between Arlington School and Carter G. Woodson School. The defendants argue that for reasons of safety and convenience the tracks form natural boundaries for these areas. Some of the Harry E. James School attendance area lies to the north of the tracks. A ravine isolates a part of this area from the Patrick Copeland School area.

If the boundaries of the attendance areas had been located only with reference to the tracks and ravine, the defendants' argument would have considerable merit. However, the tracks have not been used consistently as bound-

aries. The same Norfolk and Western tracks bisect the Woodlawn school attendance area. The Seaboard Air Line tracks cross the DuPont School area. Portions of the DuPont and Patrick Copeland school areas lie south of the Norfolk and Western tracks, and part of the Harry E. James School area lies north of the tracks. Also there is no natural barrier between the Woodlawn School area and the Arlington School area.

The capacity of the schools, compared with the attendance of the students, provides no rational criterion for the boundaries which have been selected. For example, the Patrick Copeland School has a capacity of 740 students, with attendance of 770. Adjacent to this school area is the Harry E. James School with a capacity of 330 but only 167 in attendance. Nevertheless a portion of the Patrick Copeland School area flows across the railway tracks into the Harry E. James School area. Hopewell High School for white students has approximately 200 students over its capacity. The Carter G. Woodson High School for Negro students has approximately 100 students less than capacity.

On one occasion white students whose family moved into a Negro residential area were enrolled in a white school instead of the school which served the attendance area of their residence. This was done, in part, because the family intended to build a home in a white residential area.

In *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955), the Court said:

> "While giving weight to these public and private considerations, the courts will require that the defen-

dants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

This case falls within the language of *Brown* pertaining to "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis."

The racial composition of neighborhoods may result in predominantly white or predominantly Negro school districts even after the areas have been reshaped to comply

with the mandate of *Brown*. This, in itself, would not be a badge of unconstitutionality. *Thompson* v. *County School Board of Arlington County, Virginia,* 204 F. Supp. 620 (E. D. Va. 1962). The existence of this situation was recognized in *Dillard* v. *School Board of the City of Charlottesville,* 308 F. 2d 920 (4th Cir. 1962). The vice of the Charlottesville plan was not the composition of its attendance areas. The plan was invalid because of its unconstitutional provision for the transfer of students who found themselves in a racial minority. *Goss* v. *Board of Education,* 31 U. S. L. Week 4559 (U. S. June 3, 1963).

The use of race to establish residential requirements for school assignments has been held invalid in this Circuit. In *Green* v. *School Board of the City of Roanoke, Virginia,* 304 F. 2d 118, 122 (4th Cir. 1962), Chief Judge Sobeloff wrote:

> "This court has on several occasions recognized that residence and aptitude or scholastic achievement criteria may be used by school authorities in determining what school pupils shall attend, so long as racial or other arbitrary or discriminatory factors are not considered. See, e.g., Dodson v. School Board of City of Charlottesville, Virginia, 289 F. 2d 439, 442 (4th Cir., 1961); Jones v. School Board of City of Alexandria, Virginia, 278 F. 2d 72, 75 (4th Cir., 1960). But if these criteria, otherwise lawful, are used in a racially discriminatory manner, the resulting assignment is not saved from illegality. As we have more than once made clear, school assignments, to be constitutional,

must not be based in whole of in part on consideration of race."

In *Evans* v. *Buchanan*, 207 F. Supp. 820, 824 (D. Del. 1962), the distinction between valid and invalid attendance areas is clearly drawn:

> "There have been many lower court decisions since the Brown case held children may not be denied entrance to public schools solely on the basis of race. One of the teachings of these cases is that whether Negro children are deprived of their constitutional rights is a question of fact. Criteria such as transportation, geography and access roads are rational bases for establishing public attendance areas or designating school districts. If, however, these criteria are merely camouflage and school officials have placed children in particular districts solely because of race, a cause of action under the Constitution exists."

The Court concludes that the application of the foregoing principles to the facts in this case demonstrates that the present attendance areas do not satisfy the requirements set forth in *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955).

The plaintiffs, who sought admission to Hopewell High School, also were denied assignment to that school because of the distance from their residences to the school. White students were admitted to Hopewell High School regardless of the distance of their residences from the school.

The Court concludes that the reasons assigned for denying admission to the plaintiffs were constitutionally discriminatory.

These students were also denied admission for failure to follow established procedure. Two students seeking admission to Patrick Copeland Elementary School were denied admission because they failed to apply on an official blank. One application to Hopewell High School was "filed too late." It is quite obvious, however, that the primary reason that all students were denied admission was because of the defendants' rigid adherence to the long established attendance areas. Under these circumstances it is well settled that failure to exhaust administrative remedies is not a defense. *McNeese* v. *Board of Education*, 31 U. S. L. Week 4567 (U. S. June 3, 1963); *Bell* v. *School Board of Powhatan County, Virginia*, No. 8944 (4th Cir. June 29, 1963).

The Court further concludes that a general injunction should be granted against the school officials prohibiting racial discrimination in the admission of students to schools and from assigning students on the basis of the school attendance areas currently existing. The defendants may submit to the Court a more definite plan providing for immediate steps looking to the termination of discriminatory systems and practices. *Bradley* v. *The School Board of the City of Richmond, Virginia*, No. 8757 (4th Cir. May 10, 1963).

The plaintiffs also pray that the defendants be required to pay costs and attorneys' fees. In *Bell* v. *School Board of Powhatan County, Virginia*, No. 8944 (4th Cir. June 29,

1963), the Court of Appeals, pointing to "* * * the long continued pattern of evasion and obstruction * * *" on the part of the defendants, allowed attorneys' fees. The Court does not find that the same situation exists in this case, and the prayer for attorneys' fees is denied. Costs will be allowed.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

July 11, 1963

Ruling of the Court

[April 6, 1964]

The Court: Gentlemen, the situation in Hopewell is rather unusual in Virginia. Most Virginia cities have the Negro population and the white population scattered through them. In Hopewell, for some reason—possibly because it is largely an industrial city—but for some historic reason, the Negro population and the white population occupy generally different residential zones. In that respect, it is somewhat like many of the cities of the North where the great issue before the Courts is one of de facto segregation.

There is a split of authority concerning that situation. Some of the New York courts have condemned the de facto segregation, and opposed to them is the case of *Bell* v. *School Board of Gary,* which is reported in 32 Law Week 2219 (7th Cir. 1963).

The starting point for consideration of these cases is, of course, *Brown* v. *Board of Education,* 349 U. S. 294 (1955). That is the second Brown case, where at page 300, the Court said:

> "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regu-

lations which may be necessary in solving the foregoing problems."

Then the Court goes on to speak about the period of transition to achieve such a school system; and in more recent cases, has indicated that period of transition has about completed its course.

The Court is of the opinion that the Court of Appeals for the Fourth Circuit has interpreted Brown to justify, or to permit school districts based on neighborhoods which may or may not result in predominantly white or Negro schools.

The Court realizes that the exact problems presented by this case have not been considered by the Court of Appeals for the Fourth Circuit, but it has come to the conclusion, which it mentioned through consideration of *Dillard* v. *School Board of the City of Charlottesville,* 308 F. 2d 920 (4th Cir. 1962). The trouble with the Charlottesville plan was not the composition of its attendance areas. The Court recognized that they were not gerrymandered. The plan was invalid because of the provision for transfers.

This case was before this Court previously on July 11, 1963. The Court filed a memorandum, which must be considered in its decision today. There is no need of repeating all of it, but that decision will be incorporated in the decision of the Court today.

The Court finds that the school zones are as set out in the map which has been filed as an exhibit; that the capacity of the several schools, their attendance, the pupil-teacher

ratio, as of May 1963 and as of September 1963, are as set forth in Plaintiffs' Exhibit 1A, with the exception that the Court does find from the testimony that the capacity of the James School is 300 in May 1963 and not 330 as set forth in the exhibit. I am going to mark that exhibit so it can be more readily understood to write after the word "Hopewell," the word "High," as counsel have indicated at the Bench during the trial; and after "Woodson," the word "High;" and the bottom Woodson will be called "Elementary." That is what the evidence showed, and it simply makes the exhibit plainer to understand.

The question, then, before the Court is primarily one of fact. The Court is of the opinion that the law, as set forth in *Bell* v. *Indiana School District,* is consistent with the law that has been applied by the Court of Appeals for the Fourth Circuit. We do not have the question of law before us concerning de facto segregation.

The Court believes that this conclusion is also consistent with *Brown* v. *Board of Education,* 349 U. S. 294 (1955). The plan, to conform with *Brown,* would have to take into consideration the language of *Brown,* which the Court has previously mentioned. As far as assignment of students is concerned, it would be the "revision of school districts and attendance areas into compact units to achieve a system of determining admission to public schools on a nonracial basis."

Turning to the factual situation which is before the Court, the Court finds that the plan contemplates that all of the children presently attending the Patrick Copeland Elementary School, the Dupont Elementary School, and the

Woodlawn Elementary School are assigned to the Hopewell High School. These elementary schools are predominantly white schools, and Hopewell High School is predominantly a white school.

The children attending the Harry E. James Elementary School, the Arlington Elementary School, and the Carter G. Woodson Elementary School all attend the Carter G. Woodson High School. These elementary schools are predominantly Negro, and the Carter G. Woodson High School is predominantly Negro.

The capacity of Hopewell High School is overtaxed. The capacity of the Carter G. Woodson High School has not been reached.

The pupil-teacher ratio also shows a large discrepancy with a higher pupil-teacher ratio than the Hopewell High School.

Contrasted with that is the situation of the Woodlawn Elementary School zone. Children from that zone have to go a considerable distance farther to Hopewell High School than if they were assigned to the Carter G. Woodson High School. They also have to cross more railroad tracks and highways.

The area adjacent to the Arlington School zone, which presently feeds into the Woodlawn School, is predominantly white. The line has been drawn separating the predominantly white neighborhood from the predominantly Negro neighborhood.

Now, the Court recognizes that, as counsel have said, you could draw a line, or suggest drawing lines, any place,

and that the School Board has exercised its discretion in drawing the line where it did along Wall Street—or Wall Avenue. If that caused an imbalance, say, from 30 to 40 per cent—didn't quite bring it out to 50 per cent—white and Negro, why, the Court would certainly follow that line of reasoning. The primary responsibility is, the Court recognizes, for the School Board to draw these lines. But when it ends up, as it does, with a completely segregated school system, the Court is of the opinion that the language of the Court of Appeals in the *Brooks* case is pertinent.

That language is in *Brooks* v. *County School Board of Arlington County, Virginia,* 324 F. 2d 303 (4th Cir. 1963), page 308. There, the Court of Appeals, speaking of the District Court for this District said:

> "The District Court's finding that there is no evidence to sustain the charge that geographical boundaries were established to maintain segregation is clearly erroneous. The testimony offered in the 1957 hearing was made a part of the record in this case. There the Division Superintendent of Schools, called by the plaintiffs as an adverse witness, testified that the Hoffman-Boston facility was established as the only Negro senior and junior high school for the entire county; that this action was based entirely upon race; that the boundaries of the three elementary school districts were fixed in a like manner; and that later the Pupil Placement Board assigned approximately 2000 pupils of all grades, and in each instance without exception whites were assigned to white schools and Negroes to Negro schools, effectively freezing white and Negro

children in their racially segregated schools. By stipulation it appears that since the 1957 hearing, except for the disjunction of the non-contiguous northern territory, the districts remain unchanged."

This case presents a number of unusual and different problems, which have not been considered by the Court of Appeals for this Circuit, insofar as the Court has been advised through counsel's research, and insofar as the Court itself knows; and also problems that have not been considered by the District Courts in this Circuit. Nevertheless, applying the principles which have been expressed in *Brown* and in *Gary* and in *Brooks,* the Court is of the opinion that the plan does not satisfy the requirements which have been stated by the appellate courts. For that reason, the motion to approve the plan is denied.

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Opinion Dated May 25, 1964

[Filed May 25, 1964]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9258

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and mother and next friends, *et al.*,

Appellees,

versus

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia; and E. J. OGLESBY, ALFRED L. WINGO and E. T. JUSTIS, constituting the Pupil Placement Board of the Commonwealth of Virginia,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
JOHN D. BUTZNER, JR., District Judge.

(Argued April 27, 1964. Decided May 25, 1964.)

Opinion Dated May 25, 1964

Before:

SOBELOFF, *Chief Judge,*

HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL,
Circuit Judges, sitting en banc.

Frederick T. Gray and A. B. Scott (Robert Y. Button, Attorney General of Virginia, R. D. McIlwaine, III, Assistant Attorney General, and Williams, Mullen and Christian, and Peyton, Beverley, Scott and Randolph on brief) for Appellants, and Henry L. Marsh, III (S. W. Tucker on brief) for Appellees.

HAYNSWORTH, Circuit Judge:

The issues tendered by the defendants in this school case have become moot. The appeal will be dismissed for that reason.

As background, reference should first be made to an earlier order from which no appeal was taken.

The Hopewell School Board had been assigning pupils on the basis of geographic zoning, except that members of racial minorities thus assigned to a school were allowed to transfer to some other school in which their race was in the majority. Nine Negro students, in a spurious class action, attacked this method of assignment. In an order dated July 11, 1963, the District Court found that the zone boundaries in some instances had been drawn along racial residential lines, rather than along natural boundaries or the perimeters of compact areas surrounding particular

schools. It concluded that denial of admission of the nine pupils to the schools of their choice was discriminatory. A general injunction was issued. There was a proviso, however, that the School Board might submit a plan for the termination of its discriminatory practices, and, if approved, the general injunction would be suspended and the Board's plan placed in effect.

The School Board accepted this order, and took no appeal from it. Thereafter, it undertook a revision of the school attendance areas, and it eliminated the provision for minority transfers.

Before the Board's revision of its assignment plan was completed, however, and before it was submitted to the Court for approval, it denied fifteen other transfer applications. As to seven, it did so upon the ground that their applications had not been filed by May 31, 1963. As to eight, it did so upon the ground that each of the eight lived close by the school to which he had been assigned and relatively far from the school to which he sought admission.[1] The fifteen filed a motion to intervene in the pending suit and a motion for further relief. By an order dated September 13, 1963, the District Court ordered admission of the fifteen intervening plaintiffs to the schools of their choice.

From this order of September 13, 1963, the School Board and the other defendants have appealed. They contend that seven of the fifteen pupils involved had not applied for transfers prior to May 31, 1963, as required by the rules

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[1] This is also true of the seven whose transfer applications were tardy.

of Virginia's Pupil Placement Board, one of the appealing defendants, and that the denial of the transfer applications was on non-racial, non-discriminatory grounds. In connection with the latter contention, the School Board says it was not applying its old attendance zones but new ones, revised for the purpose of meriting the approval of the District Court. In any event, it says, the school to which each of the fifteen was assigned by it was so close and conveniently accessible to his residence that under any conceivable geographic assignment system he could not have been assigned to any other school. It professes its good faith in denial of the fifteen transfer applications, and its effort in good faith to comply with the law is elsewhere evidenced.

The only immediate effect of the order of September 13, 1963, was the admission of the fifteen intervening plaintiffs to the schools of their choice for the academic year 1963-4. They were admitted, as the order required. That academic year approaches its end. Retransfers at this late date are impractical, as the Board concedes. Indeed, a retransfer of those fifteen pupils during this academic year was not an object of this appeal.

When the School Board transferred the fifteen pupils and accepted those transfers as final for the entire academic year 1963-4, it fully complied with the order of September 13, 1963. The order requires nothing else of it. The controversy has thus become moot.

It is apparent that this appeal was perfected by the School Board out of fear of some future order which it envisions as being within the implications of the order of September 13, 1963. It reads the order of September 13,

1963, as implying that it has no control of assignments, because of the injunction order of July 11, 1963, until it shall have obtained approval of a revised assignment plan. It conjures up the spectre of its helplessness if faced with a flood of transfer applications seeking admission to one of its schools for the 1964-5 academic year.

Its alarms are groundless. The order of September 13, 1963, has no such implications.

Until a new assignment plan is approved, the School Board may limit attendance at any particular school in terms of that school's capacity. It may be that, in order to avoid discrimination, it should permit enrollment in a particular school on a first come first served basis, regardless of race, but when that school is filled, the remaining applicants may be relegated to a second choice of some school not yet filled.

Moreover, the District Court has a wide discretion in authorizing the use of assignment criteria in an interim period during which permanent assignment plans are being formulated and considered. If the School Board feels the need of greater authority than it supposes it has in the interim period, it may apply to the District Court for an interim order accommodating the needs of the Board and the rights of the pupils.

Here, illustratively, the School Board represents to us that it has submitted a revised geographic assignment plan which the District Court has found objectionable only with respect to one boundary. Until the boundary between those two of a number of zones has been acceptably redrawn, it may be that, upon application, the District Court would

permit geographic assignments of all pupils living in all of the other zones, while requiring some other assignment method for pupils living in the two unsettled zones. Whether or not it would, and under what circumstances, would be for the District Court to determine in an exercise of an enlightened discretion with full knowledge of the relevant facts. It is mentioned here only as illustrative of the possibilities of relief for a School Board, endeavoring to bring itself into compliance with the requirements of the law, when it stands in real need of interim authority beyond that it clearly possesses.

Of course, the most effective means by which the School Board may avoid anticipated difficulty in handling assignments for 1964-5 is to produce and submit an approvable plan in time to have it become operable when those assignments are to be made.

Since there has been full compliance with the order of September 13, 1963, and since we cannot now review some order which may be entered in the future affecting assignments for the school year 1964-5, the appeal is moot.

Appeal dismissed.

I concur.

SIMON E. SOBELOFF
U.S.C.J.

ALBERT V. BRYAN, Circuit Judge, dissenting:

I think the appellant School Board still has a lively and substantial concern: what control does it retain over the schools while the new plan is in the making? Further, I do not think the order disapproving the original school

zoning, and granting a general injunction against racial discrimination, should meanwhile oust the Board of the power—indeed the responsibility—to exercise reasonable supervision over the schools.

The regulation instantly undertaken by the Board—and voided by the Court—was the rejection of 15 applications for transfer because the schools requested therein were located far from the residences of these pupils. The Board had assigned them to schools nearby their homes, that is to their neighborhood schools, an entirely lawful basis of selection. Bell v. School City of Gary, Indiana, 32 U. S. L. Week 2219 (7 Cir. Oct. 31, 1963), *cert. denied* —— U. S. —— (May 4, 1964). Furthermore, 7 of the applications had not been timely filed. That this assignment is sensible and this requirement is needed is undenied and undeniable, but the majority now holds they cannot be effectuated, during the pendency of the over-all plan, except by previously and specially obtained permission of the Court. The reverse, I think, should be the rule: regulation by the School Board continues until the Court deems it misdirected, for the bona fides of the Board is unquestioned.

These are current and pressing problems. Delineation of the remaining province of the Board should now be declared, at least to the lifting of the present circumscription.

Ruling of the Court

[July 2, 1964]

The Court: Gentlemen, the school year is fast approaching, and I believe that it is better that the Court decide this matter promptly so the authorities responsible for the education of children, and the children themselves, will understand the basis of their assignment.

The question of the school zones in Hopewell has been before the Court several times. On July 11, 1963, the Court filed a written memorandum. On April 6, 1964, the Court stated from the Bench its findings and conclusions when the plan was presented to it.

As a result of the hearings, and as a result of the consideration that the School Board has given, there have been substantial changes in the plan, or in the school zones since they were first presented to the Court.

The problem of the Woodlawn and Arlington zones still exists. Basically, the problem in this case, as the Court has previously mentioned, is one of de facto segregation.

When the Court considered the case on April 6, it followed the ruling in the *Gary* School case. Since that time, certiorari has been denied in the *Gary* case. Also, since the April 6 hearing, the Court of Appeals has written its opinion in this case.

There, the Court held that the question before it was moot, but it did consider the question of the Arlington and Woodlawn zones. It suggested that until the boundary between those two zones has been acceptably redrawn, that

upon application, the District Court could permit geographic assignments of all students living in all the other zones, while requiring some other assignment method for pupils living in the two unsettled zones.

There have been a number of suggestions before the Court for redrawing the boundary between the Arlington and Woodlawn zones. The Court need not restate the findings of fact that it has previously made, except to note that the Woodlawn School, which has a capacity of 720, and which previously had a capacity of 720, has an anticipated enrollment next fall of 712, as compared with the attendance of 649 which the Court found in the previous hearing.

Arlington School has a capacity of 270, and has an anticipated enrollment of 234, as compared with the attendance of 195 to which the Court previously made reference.

Woodson School, with the transfer of two classrooms from elementary to high school, would have a capacity of 240, as compared to the 300 previously mentioned, and would have an enrollment of 220, as compared to the previously mentioned attendance of 286.

I believe with those amendments the findings of fact are substantially as the Court has found them in the previous hearing, and the Court makes reference to its previous findings at this time, and incorporates them in this hearing.

The chief difference between the situation that now exists and that which existed at the hearing this spring when the Court declined to approve the plan is that the new plan submitted by the Board provides for transfer of Arlington or Woodlawn Elementary pupils to any school nearer a

pupil's residence. It also provides that high school students may transfer from the Hopewell High or Woodson High, as the case may be, to the high school which is nearer their residence.

The Court recognizes that the plaintiffs are not required to rezone—or present a plan of rezoning the problem area in Hopewell. Indeed, during the testimony there were several suggestions made about rezoning between the Woodlawn and the Arlington zones. It is significant, however, that the suggestions made by the plaintiffs do result in imbalance in the various schools involved.

The Court finds that the School Board has attempted in good faith to create zones consistent with the capacity and attendance of the schools, and the Court believes that the plan which has been suggested is consistent with the suggestion made by the Court of Appeals pertaining to some other assignment method in the unsettled zones.

Accordingly, the plan will be approved. The injunction will be dissolved.

All students who are presently assigned by Court order to a school will be permitted to finish their education in that school. There will not be a reassignment of those children, except by application of those children. There has been no application, because that point has not been brought up specifically. This has been treated from that time on more or less as a class action. Those individual plaintiffs have not presented their views to the Court.

Mr. Gray: May I make an inquiry?

The Court: Yes, sir.

Ruling of the Court

Mr. Gray: Would that ruling apply also to the intervenors about whom the Court of Appeals said—they apparently felt that the ruling applied only to one year.

The Court: Yes, sir. The rule applies.

Mr. Gray: To both?

The Court: It will apply to them also. It will apply to all of the children whom the Court has assigned.

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Order

[Entered July 6, 1964]

For reasons stated in the Memorandum of the Court filed July 11, 1963 and the rulings of the Court reported April 6, 1964 and July 2, 1964; it is ADJUDGED and ORDERED:

1. Subject to the requirement for notice stated in paragraph 4 of this order, the plan for the operation of schools filed by the School Board of the City of Hopewell, Virginia on June 4, 1964 is approved and the exceptions thereto are overruled.

2. The injunction granted in paragraph 2 of the order entered July 11, 1963 is dissolved.

3. All pupils heretofore assigned by the Court may continue their education in the school to which they have been assigned.

4. The School Board shall give notice in writing to each pupil entitled to make application for transfer under the plan. For the first year of the plan, applications for transfer must be filed within thirty days from the date notice is mailed to students eligible for transfer.

5. The motion for counsel fees is continued.

6. This cause is retained on the docket with leave of any party to seek further relief.

Let the Clerk mail copies of this order to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

July 6, 1964

Opinion Dated April 7, 1965

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9625.

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and mother and next friend, and all others of the plaintiffs,

Appellants,

versus

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia,

Appellees.

No. 9626.

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and mother and next friend, and all others of the plaintiffs,

Appellees,

versus

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia,

Appellants.

Opinion Dated April 7, 1965

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
John D. Butzner, Jr., District Judge.

(Argued November 5, 1965. Decided April 7, 1965.)

Before:

SOBELOFF, *Chief Judge,* and
HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL,
Circuit Judges, sitting en banc.

Henry L. Marsh, III, and S. W. Tucker for Appellants in No. 9625 and for Appellees in No. 9626, and Frederick T. Gray (Williams, Mullen and Christian on brief) for Appellees in No. 9625 and for Appellants in No. 9626.

HAYNSWORTH, Circuit Judge:

These are cross appeals from an order of the District Court approving Hopewell's geographic plan for the assignment of pupils to its schools and refusing to require the retransfer of certain Negro pupils attending schools outside of their geographic zones under a previous order of the Court. Finding no error on either appeal, we affirm.

Hopewell, Virginia, is an industrial city located at the confluence of the James and Appomattox Rivers. It is roughly bisected by the Norfolk and Western Railroad, which runs from Hopewell's southwestern border roughly northeasterly to the James River, while the Seaboard Airline Railroad divides the city in an approximately east-west direction. Except in the southwestern portion of the

city, the Norfolk and Western Railroad is bounded on its southeastern side by many factories, and there are long reaches of that railroad which are uncrossed by streets. These railroads, and the industrial sections which bound them, constitute obvious and natural geographic boundaries between residential areas, some of which are made remote from each other by the intervening industrial, nonresidential sections which abut the railroads.

The School Board adopted a geographic zoning plan. The zone boundaries were drawn along natural geographic boundaries, particularly the railroads. The schools are centrally located in each zone, except for two zones in areas annexed to the City of Hopewell after those two schools had been constructed.

Some Negroes live on the northwestern side of the Norfolk and Western Railroad. They are in an elementary school zone in which the majority of the residents are white. Pupils from the elementary school in that zone are fed automatically to a high school in which the majority of the pupils are white.

The great majority of the Negro residents of Hopewell live on the southeastern side of the Norfolk and Western Railroad. With an exception to be mentioned presently, the residential areas in which they live are separated from residential areas inhabited principally by white people by the railroad and by industrialized, nonresidential sections. One elementary school is located centrally in the area it serves, as is another combined elementary and high school attended entirely by Negroes. A third elementary school attended solely by Negroes is located at the extended city limits, this being one of the schools which came into the

Hopewell City School System by annexation after it had been constructed.

When this action was first commenced and before the court approved Hopewell's geographic zoning plan, it ordered the admission of the then infant plaintiffs into the schools of their choice. They were admitted, after which the School Board took an appeal to this Court. We held that the question was moot, since the order required their admission only for the current year and the School Board had fully complied with the order.[1]

Thereafter, after some modification of the plan, principally the addition of a provision giving any child who lived nearer to a school outside of the zone in which its residence was located a right to attend that school, the District Court approved the plan. It refused, however, to require, or permit, the involuntary retransfer of the original plaintiffs transferred pursuant to the earlier order of the Court.

The plaintiffs concede, in general, that the elementary school zone boundaries were drawn along natural geographic boundaries and barriers. They contend as unreasonable only the boundary between Arlington and Woodlawn School zones. That boundary, however, runs along a main arterial highway, and the plaintiffs can suggest no other boundary between those zones of geographic significance. Use of that boundary incorporates in the Woodlawn zone certain areas which are closer to Arlington School. However, any transfer to Arlington of any readily divisible portion of that part of the Woodlawn School zone lying

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[1] *Gilliam* v. *School Board of City of Hopewell, Virginia*, 4 Cir., 332 F. 2d 460.

closer to Arlington School would result in a transfer to Arlington School of far more pupils than it could receive, leaving Woodlawn School greatly underpopulated.

These are the two schools which Hopewell acquired by annexation of adjacent territory. Neither is centrally located in the zone it serves, but the main highway along which the School Board has drawn the boundary which separates those two zones is patently the most logical and reasonable. Such an artery is a natural boundary to choose in the absence of any other significant geographic feature. The fact that a portion of Woodlawn zone lies closer to Arlington School than Woodlawn School is not a valid objection to the plan when incorporating a portion of that area into the Arlington School zone would leave Arlington overwhelmed with pupils, for which it could not care, and Woodlawn greatly underpopulated. Arlington zone's other boundaries are the limits of the City, the Seaboard Airline Railroad and industrial areas, so that there are no feasible compensating adjustments by which portions of the Arlington zone might be shifted to permit it to include a portion of Woodlawn zone.

Under these circumstances, the District Court was abundantly justified in concluding that the zone boundaries were reasonably drawn in accordance with natural geographic features and not on racial lines.

Assignments to the high schools are made in accordance with a feeder system. We find nothing objectionable in this when the primary school zoning is on a nonracial basis, for the result is, in effect, to create reasonable zones for the high schools. The zones of those primary schools which feed each high school are collectively the zone for the high

school. So viewed, the high school zones are as compact and reasonable as the primary school zones which we have considered.

The plaintiffs suggested below that the high school zones might have been drawn differently, but their suggestion was impractical because it would have overly crowded one school while underpopulating another. The School Board's lines achieved an even distribution of pupils, and there was an evidentiary basis supporting the District Court's approval of them.

Under the plan, the School Board reserved the right to consider transfer applications to a school other than the one serving the zone in which the pupil resides if founded upon some specific reason, but the plan provides that the race of the applicant will not be a factor to be considered in granting or denying such a transfer application. The School Board in this Court insists that the reservation is intended to take care of extraordinary cases such as that of a crippled child whose mother is a teacher in a school other than one in the zone in which they reside. It is not to be used, the Board says, for the purpose of avoiding or increasing the extent of the mixing of the races in the schools which results from the geographic zoning plan. That is the clear purpose and effect of the plan's limitation upon the reservation. The restriction saves the reservation which would otherwise be suspect, for permissive transfers of minorities granted because of their race are unlawful.[2]

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[2] *Goss* v. *Board of Education of Knoxville, Tennessee*, 373 U. S. 683; *Dillard* v. *School Board of City of Charlottesville*, 4 Cir., 308 F. 2d 920.

The plaintiffs object that the result of the geographic zoning is a large measure of *de facto* segregation. It is true that it is, but this is because of the residential segregation that exists. The Harry E. James School zone, for instance, bounded in part by Hopewell's city limits, is otherwise largely surrounded by railroad classification yards and industrial tracks, with adjacent industrialized areas, which isolate the residential portions of that zone from all other residential areas. *De facto* segregation could be avoided for those pupils only by transporting them to distant schools.

While the Carter Woodson and the Arlington school zones are not so isolated as the Harry E. James school zone, substantially the same thing may be said of them. They are not gerrymandered zones designed to impose a segregated school population, but *de facto* segregation results from the fact that the surrounding residential areas are inhabited entirely by Negroes.

The Constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools.[3]

The plaintiffs also complain that the District Court did not order a general reassignment of teachers and administrative personnel on a nonracial basis. There has been no inquiry into that matter in the District Court, and the failure of the District Court here to enter an order in accordance with this request of the plaintiffs is affirmed for

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[3] *Bell* v. *School City of Gary, Indiana*, 7 Cir., 324 F. 2d 209; see also *Bradley* v. *School Board of City of Richmond, Virginia*, 4 Cir., —— F. 2d —— (decided this day).

the reasons stated in Bradley v. School Board of City of Richmond, Virginia, 4 Cir., —— F. 2d —— (decided today).

The School Board's appeal from the Court's refusal to require or permit the involuntary reassignment of the fifteen pupils, we also find to be without merit.

It is true that in our earlier opinion[4] we held that the original order of the District Court required the admission of these fifteen pupils to the schools of their choice for the then current school year only. That was the school year of 1963-4. Under the geographic zoning plan, which the Court has now approved, those fifteen pupils would be assigned to other schools than those they now attend.

A reassignment of those fifteen pupils to the schools they attended prior to 1963-4 may have a substantially adverse effect upon them. The District Court was entitled to give consideration to that fact, though their continued attendance at the schools where they were assigned for 1963-4 is inconsistent with the otherwise uniformity of the geographic attendance plan.

In approving a geographic zoning plan, indeed, any other plan for the assignment of pupils, a District Court has a large measure of discretion in imposing such conditions or exceptions as fairness and justice seem to it to require. The question, therefore, is not answered by a finding that the assignment of these pupils is a departure from the geographic zoning plan which we now approve. It is an exception to it, but the exception imposed by the District Court

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[4] *Gilliam* v. *School Board of City of Hopewell, Virginia*, 332 F. 2d 460.

in the interest of fairness to these fifteen individuals was not beyond the range of discretion vested in it.

We find no reversible error in the order of the District Court.

Affirmed.

SOBELOFF and J. SPENCER BELL, Circuit Judges, concurring separately:

The neighborhood school concept is a legitimate one, and insofar as zone boundaries are drawn without racial discrimination along natural geographical lines we agree that they may be accepted as valid. We are conscious, however, that the size and location of a school building may determine the character of the neighborhood it serves. In applying the neighborhood school concept, the School Board, therefore, must keep in mind its paramount duty to afford equal educational opportunity to all children without discrimination; otherwise school building plans may be employed to perpetuate and promote segregation.

We also note the reservation contained in the opinion of the court in respect to the possible misuse of the transfer plan; and assume that the District Court will be alert to prevent abuses. With these considerations in mind and subject to the views expressed more fully in our separate opinion in the *Richmond* case decided this day, we concur in the judgment of the court.

Opinion Dated April 7, 1965

ALBERT V. BRYAN, Circuit Judge, dissenting in part:

With the plan of desegregation approved, as it is, I can see neither logic nor other ground for not retransferring the fifteen pupils to the school the plan provides for them. The School Board has requested the reassignment. However, the Court finds it would "have a substantially adverse effect" upon the students. It seems to me the school authorities are better versed than are we on that score. Moreover, the assignment initially was understood to be simply provisional. Finally, the Board as well as the scholars is entitled to indiscriminate enforcement of a legitimate plan.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9625

RENEE PATRICE GILLIAM and REUBEN LEMUEL GILLIAM, JR., infants, by REUBEN L. GILLIAM and JOY T. GILLIAM, their father and next friend, and all others of the plaintiffs,

Appellants,

vs.

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, and CHARLES W. SMITH, Division Superintendent of Schools of the City of Hopewell, Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record for the United States District Court for the Eastern District of Virginia, and was argued by counsel.

Judgment

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this case, be, and the same is hereby, affirmed with costs.

April 7, 1965

CLEMENT F. HAYNSWORTH
Chief Judge, Fourth Circuit

Filed
Apr. 7, 1965

MAURICE S. DEAN
Clerk

NOTE: The map on the facing page is a photographic reproduction of the original Defendant's Exhibit 1, with hand coloring of significant features to approximate the original coloring.

(See opposite) ☞

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PRINCE GEORGE
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CITY LIMITS
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CHESTERFIELD

COUNTY

APPOMATTOX

RIVER

ESTERFIELD

COUNTY

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CA 3554
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